Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)
	)
Request for Waiver of Section 54.315(c) to the Commission's Rules Pending Action on a Petition for Rulemaking Seeking Amendment of the Commission's CAF II Letter of Credit Requirements Consistent with Rule Changes Adopted for the Rural Digital Opportunity Fund	)

To: The Commission

REQUEST FOR WAIVER

The Connect America Fund Phase II Coalition ("CAF II Coalition"),[1] pursuant to Section 1.3 of the Commission's rules, 47 C.F.R. §1.3, hereby respectfully seeks waiver of Section 54.315(c) of the Commission's rules, 47 C.F.R. §54.315(c), to allow recipients of universal service high-cost support awarded in the Connect America Fund Phase II ("CAF II") auction to comply with the recently-adopted letter of credit provisions of Section 54.804(c) of the Commission's rules, 47 C.F.R. §54.804(c), instead of those provided for under Section 54.315(c). This waiver request is submitted contemporaneously with the attached Petition for Rulemaking ("Petition") in which the CAF II Coalition asks the Commission to initiate a rulemaking proceeding for the purpose of conforming the requirements of Section 54.315(c) to make them consistent with the provisions Section 54.804(c), which was adopted in connection with the establishment of the Rural Digital Opportunity Fund ("RDOF").[2] Because CAF

[1] *See* Attachment 1, List of Members of the CAF II Coalition.

[2] *See* Attachment 2, copy of Petition for Rulemaking.

recipients will soon be required to renew or obtain new letters of credit for the second year of support, the CAF II Coalition respectfully requests expeditious grant of this waiver request.

Background

Each of the members of the CAF II Coalition successfully competed in the reverse auction for CAF Phase II support, and each has been authorized to receive high-cost support. Collectively, the members of the CAF II Coalition have been authorized to receive a large portion of the support to be distributed pursuant to the CAF Phase II reverse auction that concluded in August 2018. As required by Section 54.315(c), each member has obtained one or more letters of credit, which are subject to draw if the recipient fails to meet a buildout milestone by 50 percent or more. Going forward, CAF Phase II recipients will need to renew their letters of credit annually or obtain new letters of credit from eligible banks. Each year, the amount of the letter of credit will increase to cover the amount of past disbursements of support plus the amount for the upcoming year. The Commission's rules allow for modest reductions in the amounts of letters of credit as the 60 percent and 80 percent buildout milestones are achieved and verified by USAC.

In the RDOF proceeding, the Commission responded to overwhelming record evidence presented by a diverse range of commenters that demonstrated the letter of credit requirements imposed upon CAF Phase II recipients have been counterproductive in critical respects.[3] Not only are these rules diverting funds intended for deployment of new service to the payment of substantial bank fees, they also constrain the ability of recipients to borrow funds to expedite delivery of supported voice and broadband services. This is because the cost to obtain and

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[3] *See Rural Digital Opportunity Fund*, Report and Order, WC Docket Nos. 19-126 and 10-90, FCC 20-5 (rel. Feb. 7, 2020) ("*RDOF Order*") at 44, ¶97.

maintain a letter of credit is on the order of five percent of the value of the letter of credit – an amount that increases with each year – and is treated as a contingent liability on the books of the CAF recipient, thereby limiting the recipient's borrowing power. The basis for the new rule adopted in the *RDOF Order* and the applicability of its revised terms to the very similar CAF Phase II support program are conclusively established in the detailed discussion contained in Sections I and II of the attached Petition.

The individual members of the CAF II Coalition and the customers they will serve would gain substantial benefit from the proposed rule changes. Since beginning to receive support less than one year ago, the participating CAF II support recipients have made significant progress in deploying voice and broadband service using CAF II funding, progress that should be rewarded through earlier opportunities to reduce high-cost letters of credit. Examples of this progress include:

> ***AMG Technology Investment Group LLC dba Nextlink***: Has initiated service in CAF-supported areas in Texas, Oklahoma and Nebraska and expects to provide coverage in all six states where it is receiving support within Year One of its build-out. New facilities completed include 217 fixed wireless transmit sites that provide service to CAF-supported rural areas. With four months to go before the end of Year One, 11,843 locations out of 100,661 total locations are receiving service (11.8 percent of the total). The company is positioned to achieve a minimum of 35 percent completion across all CAF states and coverage of approximately 50 percent of eligible locations by the end of Year Two based on the current scope of deployment and the accelerating pace of construction.
>
> ***Cal.net, Inc.***: Is building the infrastructure now in four of the 26 CAF-supported counties by upgrading backhauls, fiber feeds, and access points on tower sites. The company also is upgrading its core routing and switching fabric to handle the increased capacity for CAF-mandated service levels. Most of this work will be completed within the next three months.
>
> ***Chariton Valley Communications Corporation***: Has constructed approximately 380 miles of new fiber links and has built out infrastructure to provide service to 307 locations, slightly more than 36 percent of the locations for which it is receiving CAF II

support. It expects to meet its Year 3 obligation to serve 40 percent of supported locations before the end of Year 2.

IdeaTek Telcom, LLC: Has completed 50 miles of activated fiber with approximately another 50 miles under construction. IdeaTek has activated approximately eight percent of its awarded locations in the first nine months of its CAF II funding. It currently plans to be at roughly 15 percent deployment completion by the end of Year One funding and 35 percent deployment by the end of Year Two funding.

Midcontinent Communications: Has constructed 20 new fixed wireless facilities in rural areas near the communities of Mitchell, South Dakota and Fargo and Grand Forks, North Dakota. The company also has installed approximately 220 miles of new long-haul fiber in central Minnesota to serve CAF-supported locations. During 2020, it is expected that new service will be provided to rural areas near Huron, South Dakota and Jamestown, North Dakota and that fiber installation will be extended in central and Southwest Minnesota.

W.A.T.C.H. TV Company: In just the few months since it started receiving CAF support in September 2019, W.A.T.C.H. TV has constructed 14 sites that cover approximately 3,950 of the 23,000 locations included in its supported areas. It expects that it will provide additional service to 6,500 locations before the end of the second quarter of 2020, providing service to about 45 percent of its supported locations within the first year of build-out activity.

Relief from the more onerous aspects of Section 54.315(c) by establishing earlier benchmarks for reducing required letter of credit value would enhance the ability of these recipients to implement service on an expedited basis by freeing up more resources for network deployment.

Discussion

The purpose of this waiver request is to urge the Commission to conform, first via waiver and ultimately via rule change, the revisions to the letter of credit requirements adopted for the new RDOF program to recipients of CAF Phase II support. The letter of credit rules adopted in the *RDOF Order* significantly improve the agency's approach and reduce disproportionate burdens on CAF Phase II recipients, and it would serve the public interest to apply them immediately for the benefit of entities that are receiving CAF Phase II support.

Such action is appropriate for the same reasons that prompted the Commission to adopt these rule changes for the RDOF program. Indeed, the Commission already expressly recognized in the *RDOF Order* "that the letter of credit rules, as originally proposed [i.e., the same rules that were imposed in and continue to apply to the CAF II program], ***would impose a disproportionate financial burden on support recipients and result in less funding going directly to broadband deployment***."[4] Accordingly, in addition to reducing financial burdens on service providers, the application of the letter of credit rules contained in new Section 54.804(c) will, as the Commission has implied, free up recipients' capital and make more funds available for near-term deployment of supported voice and broadband service. In addition, waiver will provide additional incentives for service providers to roll out new coverage to a significant number of locations earlier in the support term.

It is well within the Commission's authority under Section 1.3 to grant immediate relief based on the record established in the RDOF proceeding. That rule permits the Commission to grant a rule waiver "for good cause shown, in whole or in part, at any time," including on its own motion without a formal request.[5] A waiver may be granted if the grant "would not undermine the policy objective of the rule in question and would otherwise serve the public interest," or in circumstances "where particular facts would make strict compliance inconsistent with the public

[4] *Id.* at 46, ¶105 (emphasis added). Section 54.804(c) establishes that the letter of credit for the first year of support will be equal to at least one year of support; for the second year of support, the letter of credit will be equal to at least 18 months of support; for year three, the letter of credit will be equal to at least two years of support. The value of the letter can be reduced if the RDOF recipient deploys service to at least 20 percent of locations in the first two years, and he value of the letter of credit will be increased if the RDOF recipient misses buildout milestones. In no case will the value of the letter of credit exceed three years.

[5] 47 C.F.R. §1.3. For the rural broadband experiment program and CAF program, the Commission has, on its own motion, waived the requirements in Sections 54.202(a)(1)(ii) and 54.313 to file five-year plans. *See, e.g., Connect America Fund,* 29 FCC Rcd 8769, 8795, ¶77 (2014); *Connect America Fund,* 28 FCC Rcd 2051, 2054, ¶8 (WCB 2013).

interest."[6] As stated above, the Commission has already made such a finding by adopting a revised approach to the letter of credit requirements in its rules for the RDOF auction. It is clear that the Commission believes that the updated requirements will not only cause no harm to its policy objective of "ensuring that universal service funding is protected," but that the revised approach strikes an appropriate balance between this objective and "the interest of potential support recipients in minimizing their financial cost over the course of the deployment term," thereby serving the public interest.[7] These facts also support a finding of "special circumstances" – the CAF Phase II program was the first widescale auction for fixed voice and broadband support, and neither the Commission nor recipients had any historical data or experience to inform the Commission's predictive judgment on the impact of the ever-increasing amounts of letters of credit. The experiences of CAF II recipients provided valuable insight for the Commission's decision in the *RDOF Order* to reduce substantially the burdens inherent in obtaining and maintaining letters of credit, and those circumstances should lead to the same finding of "disproportionate financial burden[s]"[8] for similarly situated CAF II recipients consistent with the public interest.

The reforms that the Petition requests need not wait for an entire rulemaking proceeding to be initiated, evaluated and completed. Given the compelling evidence provided in the attached Petition that the proposed rule changes will serve the public interest, the benefits inherent in new Section 54.804(c) of the Commission's rules should be promptly extended via

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[6] *Northeast Cellular Telephone Co., L.P. v. FCC,* 897 F. 2d 1164, 1166 (D.C. Cir. 1990), *citing WAIT Radio v. FCC,* 418 F.2d 1153, 1159 (D.C. Cir. 1969). *See also Connect America Fund*, Order, WC Docket No. 10-90, *et al.*, DA 20-217 (rel. Mar. 3, 2020), at 5&6, ¶¶8&11 (granting waiver to allow carriers to merge study areas in light of "special circumstances [that] warrant a deviation from the general rule and such deviation will serve the public interest").

[7] *RDOF Order* at 47, ¶105.

[8] *Id.* at 46, ¶105.

grant of this waiver request to entities that are receiving funding pursuant to the CAF II auction, allowing them to comply with the new provisions of Section 54.804(c) in lieu of those contained in Section 54.315(c). By granting the waiver the Commission would, in effect, allow CAF II recipients to begin freeing up resources for investments in broadband infrastructure today – a result that is undoubtedly in the public interest.

The CAF II Coalition respectfully requests expeditious action on this request. Many CAF Phase II recipients are beginning the process of obtaining renewal of their existing letters of credit or obtaining new letters of credit. Grant of a waiver as soon as possible would enable CAF Phase II recipients to obtain letters of credit valued at 18 months instead of two years, feeing up additional financial resources for buildout and setting the stage for further reductions in the near future, should recipients meet the buildout targets of Section 54.804(c). Moreover, and as demonstrated in Section II of the attached Petition, reducing the disparity in treatment between existing CAF II support recipients and RDOF applicants will promote the public interest by giving CAF II auction winners more purchasing power to participate in the RDOF auction. These are the same providers that have proven experience in navigating both the auction and the two-part application process, a demonstrated commitment to infrastructure deployment, and a mature understanding of the Commission's high-cost obligations, attributes that should not be disadvantaged by applying more burdensome letter of credit rules. By maintaining balance in capital commitments among CAF recipients and RDOF applicants, the requested waiver would thus benefit the millions of homes and small businesses in unserved areas by encouraging more robust competition among potential applicants for the new round of universal service support.

Respectfully submitted,

CAF II COALITION

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March 10, 2020

Its Attorneys

ATTACHMENT 1

Members of the CAF Phase II Coalition

Air Link Rural Broadband, LLC

AMG Technology Investment Group LLC dba Nextlink

Aristotle Unified Communications

AtLink Services, LLC

California Internet, L.P. dba GeoLinks

Cal.net, Inc.

Chariton Valley Communications Corporation

Citynet LLC

Crystal Automation Systems, Inc.

IdeaTek Telcom, LLC

Inventive Wireless of Nebraska, LLC

Midcontinent Communications

Newmax LLC dba Intermax

Paul Bunyan Rural Telephone Cooperative

Plains Internet, LLC

Sunset Digital Communications, LLC

SW DinehNet LLC (an affiliate of Sacred Wind Communications, Inc.)

W.A.T.C.H. TV Company

Wikstrom Telephone Company

Wilkes Telephone Membership Corporation

Wisper ISP, Inc.

ATTACHMENT 2

Copy of Petition for Rulemaking

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 54 of the Commission's	)	
Rules to Update the Provisions of Section	)	RM-________
54.315(c) to Conform to Requirements Adopted	)	
for the Rural Digital Opportunity Fund	)	

To: The Commission

PETITION FOR RULEMAKING

CAF II COALITION

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SUMMARY

By this Petition, the CAF II Coalition asks the Commission to modify its letter of credit rules for recipients of Connect America Fund Phase II support to make them consistent with the recent reforms it adopted for the similar, but much larger, Rural Digital Opportunity Fund. In establishing the RDOF rules, the Commission responded to overwhelming evidence presented by a diverse range of commenters, including large and small carriers serving rural areas, trade groups and financial institutions, demonstrating that the letter of credit requirements imposed on CAF Phase II recipients have proven overly burdensome and counterproductive to the public interest objectives of deploying voice and broadband networks in high-cost areas.

As shown in the record of the RDOF proceeding, the current CAF II requirements divert funds intended for deployment of new service to the payment of substantial bank fees amounting to as much as five percent of the value of the associated letter of credit. Moreover, the existing requirements constrain recipients from delivering voice and broadband services because the total value of the letter of credit – which currently must increase each year until very substantial construction milestones have been satisfied – is treated as a significant, additional contingent liability on the books of the CAF recipient. High debt levels, in turn, can dissuade lenders from providing additional loans to finance infrastructure deployment. This negative impact is especially harsh on smaller providers serving rural areas – those expected to play among the most significant roles in reducing the digital divide.

The Commission thus adopted significant reforms in the rule it adopted for the RDOF auction to a very substantial extent because of the issues faced by the Petitioners and other CAF II support recipients. The improved RDOF rule provides greater financial flexibility by slowing the required yearly increases in the value of the letter of credit, adding only half the value of

support scheduled for disbursement in Years Two and Three, and capping the total amount required at a maximum of three years of support. In light of the very close relationship between the CAF II support recipients experience and the adoption of the RDOF reforms, and the fact that the two universal service support initiatives serve the same purpose and will attract bidding interest from the same types of service providers, it is only reasonable and equitable for the updated rules to apply to the funding provided in both the RDOF and CAF II programs.

By reducing financial burdens on service providers, the proposed rule change will make more funds available for near-term deployment of service and provide additional incentives for service providers to roll out new coverage to a significant number of locations earlier in the buildout process. In addition, the reduced cumulative impact of the CAF II letter of credit amounts and addition of the optional interim milestone are very likely to reduce future defaults among CAF II recipients. Accordingly, every member of the CAF II Coalition – and, indeed, every recipient of CAF II support – as well as every customer that these support recipients will serve, and the Commission itself would benefit from the regulatory reforms proposed in this Petition.

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	)	
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54.315(c) to Conform to Requirements Adopted	)	
for the Rural Digital Opportunity Fund	)	

To: The Commission

PETITION FOR RULEMAKING

The Connect America Fund Phase II Coalition ("CAF II Coalition"),[1] pursuant to Section 1.401 of the Commission's rules, 47 C.F.R. §1.401, hereby respectfully petitions the Commission to initiate a rulemaking proceeding for the purpose of refining the letter of credit requirements for recipients of Connect America Fund Phase II ("CAF II") support consistent with recent reforms adopted in connection with the establishment of the similar, but much larger, Rural Digital Opportunity Fund ("RDOF").[2]

In the *RDOF Order*, the Commission responded to overwhelming record evidence presented by a diverse range of commenters demonstrating that the letter of credit requirements imposed upon CAF Phase II recipients were overly burdensome and counterproductive to the public interest objectives of deploying voice and broadband networks in high-cost areas. Not only do these requirements divert funds intended for deployment of new service to the payment of substantial bank fees amounting to as much as five percent of the value of the letter of credit, these requirements constrain recipients from delivering voice and broadband services because the value of the letter of credit – an amount that increases with each year – is treated as an

[1] *See* Attachment 1, List of Members of the CAF Phase II Coalition.

[2] *Rural Digital Opportunity Fund*, Report and Order, WC Docket Nos. 19-126 and 10-90, FCC 20-5 (rel. Feb. 7, 2020) ("*RDOF Order*").

additional, significant contingent liability on the books of the CAF recipient that dissuades lenders from providing additional funds to finance infrastructure deployment.

As a result of this evidence, the Commission adopted several significant reforms in rules adopted for the forthcoming RDOF auction.[3] By this Petition, the CAF II Coalition requests that these same reforms be promptly extended to entities that were the recipients of CAF Phase II support pursuant to the 2018 reverse auction by making the same changes to the section of the Commission's Rules applying to CAF II letters of credit.[4] The basis for the new rule adopted in the *RDOF Order* and the applicability of its revised terms to the very similar CAF Phase II support program are conclusively established in the detailed discussion contained in Sections I and II below. In short, the requested rule revisions will serve the public interest for the same reasons that prompted the adoption of identical rules for the RDOF program. In addition to reducing financial burdens on service providers, the proposed rule change will make more funds available for near-term deployment of service and provide additional incentives for service providers to roll out new coverage to a significant number of locations earlier in the buildout process.

Background

Each of the members of the CAF II Coalition successfully competed in the reverse auction for CAF Phase II support, and each has been authorized to receive high-cost support. Collectively, the members of the CAF II Coalition have been authorized to receive a larger

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[3] New Section 54.804(c) establishes that the letter of credit for the first year of RDOF support will be equal to at least one year of support; for the second year of support, the letter of credit will be equal to at least 18 months of support; for year three, the letter of credit will be equal to at least two years of support. The value of the letter can be reduced if the RDOF recipient deploys service to at least 20 percent of locations in the first two years, and he value of the letter of credit will be increased if the RDOF recipient misses buildout milestones. In no case will the value of the letter of credit exceed three years.

[4] *See* Attachment 2, "Proposed Revisions to Section 54.315(c) of the Commission's Rules."

portion of the support to be distributed pursuant to the CAF Phase II reverse auction that concluded in August 2018. As required by Section 54.315(c), each member has obtained one or more letters of credit, which are subject to draw if the recipient fails to meet a buildout milestone by 50 percent or more. Going forward, CAF Phase II recipients will need to renew their letters of credit annually or obtain new letters of credit from eligible banks. Each year, the amount of the letter of credit will increase to cover the amount of past disbursements of support plus the amount for the upcoming year. The Commission's existing rules allow for only modest reductions in the amounts of letters of credit as the 60 percent and 80 percent buildout milestones are achieved and verified by USAC. Every member of the CAF II Coalition – and, indeed, every recipient of CAF II support – would benefit from the regulatory reforms proposed in this Petition.

The individual members of the CAF II Coalition and the customers they will serve would gain substantial benefit from the proposed rule changes. Since beginning to receive support less than one year ago, the participating CAF II support recipients have made significant progress in deploying voice and broadband service using CAF II funding, progress that should be rewarded through earlier opportunities to reduce high-cost letters of credit. Examples of this progress include:

> ***AMG Technology Investment Group LLC dba Nextlink***: Has initiated service in CAF-supported areas in Texas, Oklahoma and Nebraska and expects to provide coverage in all six states where it is receiving support within Year One of its build-out. New facilities completed include 217 fixed wireless transmit sites that provide service to CAF-supported rural areas. With four months to go before the end of Year One, 11,843 locations out of 100,661 total locations are receiving service (11.8 percent of the total). The company is positioned to achieve a minimum of 35 percent completion across all CAF states and coverage of approximately 50 percent of eligible locations by the end of Year Two based on the current scope of deployment and the accelerating pace of construction.

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Relief from the more onerous aspects of Section 54.315(c) by establishing earlier benchmarks for reducing required letter of credit value would enhance the ability of these recipients to implement service on an expedited basis by freeing up more resources for network deployment.

Discussion

I. BASED ON AN EXTENSIVE RECORD, THE COMMISSION APPROPRIATELY MODIFIED ITS LETTER OF CREDIT REQUIREMENTS IN THE *RDOF ORDER*

A. In the *RDOF NPRM*, the Commission Proposed Letter of Credit Rules Identical to Those Used for the CAF II Auction

In the Notice of Proposed Rulemaking that initiated the RDOF proceeding, the Commission originally proposed to adopt "the same letter of credit rules we adopted for the CAF Phase II auction."[5] This proposal was consistent with the Commission's repeated references in the *RDOF NPRM* to the CAF Phase II auction as the appropriate model for the next round of federal universal service support.[6] At the same time, the Commission noted that the prior auction "provides a basis for lessons learned that can inform the letter of credit requirements" for the RDOF.[7] In particular, it observed "that winning bidders complained of the high cost of obtaining and maintaining a letter of credit, such that it would 'consume too much of the limited capital available to … [and] leave [in]sufficient funds for … [CAF Phase II auction] construction.'"[8] Accordingly, it specifically sought comment on alternative approaches, including whether it "should decline to require a letter of credit" for the RDOF auction altogether.[9]

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[5] *Rural Digital Opportunity Fund*, Notice of Proposed Rulemaking, 34 FCC Rcd 6778, 6805, ¶84 (2019) ("*RDOF NPRM*").

[6] *See, e.g. id.* at 6770, ¶3; 6783, ¶15; 6784, ¶¶19 & 20; 6785, ¶23; 6787, ¶28; 6789, ¶32; 6796, ¶50; 6797, ¶56; 6802, ¶¶74 & 75; 6805-06, ¶84-88; and 6807, ¶¶90-92.

[7] *Id.* at 6806, ¶89.

[8] *Id.* at 6806-07, ¶89.

[9] *Id.* at 6807.

B. Based on the CAF II Experience, Commenters Overwhelmingly Opposed the Commission's Adoption of the Proposed Letter of Credit Rules

In response to this request for input concerning the efficacy and the drawbacks of the existing letter of credit requirement, the Commission received significant comment from a broad range of parties, including large and small carriers serving rural areas, CAF II recipients, major trade associations, and lending institutions. Across this range of commenters, the concerns cited in the *RDOF NPRM* were repeated and amplified by numerous stakeholders. Many commenters recommended abandoning the letter of credit requirement entirely for a number of substantive reasons, including the high costs imposed on support recipients to secure and maintain letters of credit, the borrowing constraints that they can impose on service providers, particularly smaller companies, and the resulting diversion of support dollars intended to expand network infrastructure to defray bank fees and other costs associated with obtaining and maintaining letters of credit.[10] CenturyLink, for example, explained that the rules "are almost incomprehensibly excessive,. . . [t]he increasing sums proposed over the six-year deployment period are disproportionate to the actual risk of default, and the proposal does not account for the substantial cost that would have to be borne by RDOF participants."[11]

Windstream Services, LLC summed up the views of many by detailing the two-fold negative impact of the rules applied to the CAF II program:

> First, it affects a provider's ability to finance its deployment obligations. For example, the letter of credit could reduce the amount of credit otherwise available through a credit facility. The letter of credit makes the provider a less attractive

[10] *See RDOF Order* at 48 ¶111 & n.303 (rel. Feb. 7, 2020) (citing numerous commenters proposing alternative approaches). *See, e.g.,* Comments of NCTA – The Internet & Television Association, WC Docket Nos. 19-126 and 10-90, at 9 (filed Sept. 20, 2019) (noting that many well-qualified providers decline to participate in the USF support programs "because the Commission's letter of credit requirements are extremely burdensome and may conflict with obligations companies have to existing banks and lenders").

[11] Comments of CenturyLink, WC Docket Nos. 19-126 and 10-90, at 10 (filed Sept. 20, 2019).

> borrower, because the lender knows that the provider has a substantial (albeit contingent) outstanding financial obligation. Second, the letter of credit is itself very expensive. A carrier may pay two-to-three percent in annual fees, and some likely pay far more. Perhaps most significantly, bidders are likely to account for these expenses in their bids. Put another way, letters of credit may be paid for by the Fund, reducing the funds available for actual deployment.[12]

Noting that the burdens described are especially severe "for small and mid-sized service providers," California CAF II recipient GeoLinks observed:

> [A]s the LOC requirement grows, there is a risk that the LOC amount will outgrow a service provider's lending ability with the financial institution issuing the LOC. Under this scenario, even if a service provider is on track to complete its buildout requirements, it could find itself unable to maintain the line of credit needed for the LOC resulting in default.[13]

WISPA echoed some of these concerns by noting that "some CAF Phase II recipients are finding that the cost to obtain and maintain a letter of credit can approach 10 percent of the annual support amount."[14] With US Telecom applying similar estimates to the RDOF auction to estimate that as much as "*$1.2 billion* of the total budget will be spent on banking fees for letters of credit instead of broadband deployment."[15]

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[12] Comments of Windstream Services, LLC, WC Docket Nos. 19-126 and 10-90, at 18 (filed Sept. 20, 2019). *See also* Comments of ITTA – The Voice of America's Broadband Providers, WC Docket Nos. 19-126 and 10-90, at 15 (filed Sept. 20, 2019) ("ITTA Comments") ("The bottom line is that the *increase* in Letter of Credit values over the course of time relative to earlier years of the support term negatively affects auction winners' bottom lines. During the pendency of the Letters of Credit, auction winners are paying interest on money they are not even borrowing!") (emphasis in original).

[13] Comments of California Internet, L.P. d/b/a GeoLinks, WC Docket Nos. 19-126 and 10-90, at 10 (filed Sept. 20, 2019). *See also* Comments of AtLink Services, LLC, WC Docket Nos. 19-126 and 10-90 ("AtLink Comments"), at 2 (filed Sept. 19, 2019) ("complying with the Letter of Credit requirement of the CAF II program [was] excessively time-demanding, at times impossible, at other times impractical, and ultimately expensive").

[14] Comments of the Wireless Internet Service Providers Association, WC Docket Nos. 19-126 and 10-90, at 36 (filed Sept. 20, 2019) ("WISPA Comments").

[15] Comments of USTelecom – The Broadband Association, WC Docket Nos. 19-126 and 10-90, at 45 (filed Sept. 20, 2019) (emphasis in the original); *see also Ex Parte* Notification Letter of Patrick R. Halley, Senior Vice President, Policy & Advocacy USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 19-126 and 10-90, at 2 & Attachment (dated January 20, 2020) (detailing how letter of

Even lenders voiced concerns about the existing CAF II rules, with Live Oak Bank informing the Commission that "[i]t is not prudent to saddle Broadband providers with ever-increasing Letter of Credit face value demands, year after year, when they are required to then pay lending institutions to underwrite and secure these Letters of Credit on their behalf."[16] As WISPA summed up the issue on reply, the requirement "as currently structured imposes unreasonable costs on the recipients, and ultimately on the program, that are entirely untethered to the risk of non-performance."[17] The impact includes delays in deployment of service as the demands of large letter of credit values and associated fees reduce the ability of providers to borrow additional funds to speed the delivery of service.

Short of completely replacing the letter of credit requirement, many of these same commenters also offered suggestions for reforming the proposed rules to reduce the negative impact.[18] These proposals focused on reducing the requirement for providers to procure letters of credit with ever-increasing values deep into the buildout phase of the program until specific mandatory milestones have been met, requirements imposed despite the fact that substantial funds have already been appropriately expended to deliver service to the public. For example,

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credit "obligations scale dramatically and unsustainably" with the result that participants would be pushed "to access more credit than they are capable of accessing").

[16] *Ex Parte* Letter of John Scrivner, Vice President of Broadband Lending, Live Oak Bank, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 19-126 and 10-90, at 1 (dated Jan. 23, 2020). *See also* Reply Comments of CoBank, ACB, WC Docket Nos. 19-126 and 10-90, at 4 (filed Oct. 17, 2019) ("Requiring a LOC in the amount of just one year's support would reduce the future liability of an awardee given the required LOC would not cumulatively increase during the early years of the buildout as required under the current proposed rule").

[17] WISPA Reply Comments, WC Docket Nos. 19-126 and 10-90, at 32 (filed Oct. 21, 2019).

[18] *See, e.g.,* ITTA Comments at 17 ("ITTA proposes that Letter of Credit funding be limited to no more than two years of funding at any time"); WISPA Comments at 40 (the Commission "should alter the phase-down schedule to reduce the financial impact that letters of credit have on CAF recipients"); Reply Comments of NTCA–The Rural Broadband Association, WC Docket Nos. 19-126 and 10-90, at 27 (filed Oct. 21, 2019) ("the amount guaranteed by the letter of credit should be reduced with each milestone verified by USAC"); Reply Comments of the National Rural Electric Cooperative Association, WC Docket Nos. 19-126 and 10-90, at 10-11 (filed Oct. 21, 2019).

Aristotle, a CAF II support recipient, voiced support for the idea that the required letter of credit "should not have a value of greater than two years of support and suggested that where build-out has commenced, and as locations are entered into the [High Cost Universal Broadband ("HUBB") portal], the total LOC should be reduced by a commensurate amount."[19] As WISPA noted, "[r]educing the value of letters of credit to correspond to service milestones would encourage greater participation in the RDOF auction for many more high-cost and extremely high-cost locations, thereby ensuring a more successful RDOF auction."[20] Ultimately, a group of seven national trade associations, including USTelecom and WISPA, informed the Commission that absent modifications to the proposed letter of credit requirements, "many companies could be effectively barred from participation in the auction and those that do will not be able to bid on the full amount of locations they might otherwise be able to serve because of the difficulties in obtaining and the cost of the required credit."[21]

C. The Commission Adjusted the Letter of Credit Rules to Reduce Financial Burdens on RDOF Support Recipients

Responding to the substantial concerns and recommendations summarized above, the Commission revised the originally proposed RDOF letter of credit rules in several important respects. The Commission had noted in the *RDOF NPRM* that the effect of its proposed rule would require that, each year of the buildout term, recipients of support "modify, renew, or obtain a new letter of credit to ensure that it is valued at a minimum of the total amount of money that has already been disbursed plus the amount of money that is going to be provided in the next

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[19] *Ex Parte* Notification Letter of L. Elizabeth Bowles, President & CEO, Aristotle, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 19-126 and 10-90, at 2 (dated Jan. 28, 2020).

[20] WISPA Comments at 41.

[21] Joint Letter to Chairman Pai and Commissioners O'Rielly, Carr, Rosenworcel and Starks from INCOMPAS, NCTA, NRECA, NTCA, USTelecom, WISPA and WTA, WC Docket Nos. 19-126 and 10-90, at 1 (dated Jan. 16, 2020).

year."[22] Thus, the credit demands were to increase progressively until substantial long-term milestones were met. Instead of this approach, the Commission adopted a modified requirement that support recipients must maintain a letter of credit with a minimum amount of one year of support until the Universal Service Administrative Company ("USAC") has verified that the recipient has deployed to all supported locations.[23] The updated rule provides greater financial flexibility by slowing the required yearly increases in the value of the letter of credit, adding only half the value of support scheduled for disbursement in Years Two and Three, and capping the total amount required at a maximum of three years of support.

As an extra incentive for expedited buildout, the modified rules allow the value of the letter of credit to be reduced to the equivalent of one year of support for the entirety of the remaining buildout period if the recipient meets an optional buildout target of 20 percent of the supported locations before the end of Year Two.[24] The recipient must report the locations served to the HUBB portal and ask USAC to complete the verification process. If USAC verifies that the recipient has deployed service to 20 percent of the locations, then the recipient can reduce its letter of credit value to one year for the remainder of the buildout term provided it continues to meet all remaining mandatory buildout milestones.[25]

On the other hand, if a support recipient misses a mandatory milestone, it will be required to cover an additional year of support in its letter of credit for the next support year, subject to the maximum coverage amount of three years of support.[26] If a recipient fails to meet two or

[22] *RDOF NPRM* at 6805, ¶85.

[23] *See RDOF Order*, Appendix A, Final Rules, §54.804(c)(1).

[24] *See id.* at §54.804(c)(1)(v).

[25] *See id.*

[26] *See id.* at §54.804(c)(1)(vi).

more mandatory milestones, it will need to carry a letter of credit equal to three years of support and will also be subject to additional non-compliance penalties.[27] In no instance will an RDOF recipient be required to carry a letter of credit of more than three years.

In making these "carrot and stick" changes, the Commission stated that the determinations it made in the *RDOF Order* "take into consideration the comments submitted on the burdens associated with the letter of credit requirement,"[28] comments that were to a significant extent informed by the experience of broadband providers that received support in the CAF II auction. It also explicitly recognized "that the letter of credit rules, as originally proposed [i.e., the same rules imposed in the CAF II program], would impose a disproportionate financial burden on support recipients and result in less funding going directly to broadband deployment."[29]

II. THE SAME JUSTIFICATIONS UNDERPINNING THE UPDATED RDOF LETTER OF CREDIT RULE WARRANT IDENTICAL CHANGES TO THE CAF PHASE II RULES

As described in the foregoing section, based on detailed concerns raised by a variety of commenters, the Commission determined in the RDOF proceeding that the letter of credit requirements adopted and used for the CAF II auction should not be used for the upcoming RDOF auction, but instead should be revised to reduce the significant financial burdens imposed on support recipients. It did so based, in large part, on the ill effects of the CAF II letter of credit requirements on winning bidders as outlined by several commenters who received support in that

[27] *See id.* at §54.804(c)(1)(vii).

[28] *RDOF Order* at 48, ¶110.

[29] *Id.* at 46, ¶105.

auction.[30] Given the identity of purpose of the two programs, acknowledged similarities between the two programs, and the overlap in the potential pool of participants in the two auctions, the same rationales underpinning the changes made for the upcoming RDOF award process apply with equal force to the CAF II support awards for which support disbursement and buildout are already underway. It is entirely reasonable for the Commission to act to ensure that its rules establish parity for entities engaging in similar activities, particularly where equal treatment will foster the timely delivery of improved service to the public. Indeed, failing to establish equal treatment for the two programs could limit or prevent those that have obtained support under CAF II from also seeking funding through the RDOF program. This is so because these entities will already face substantial financial burdens from their letter of credit obligations that would limit their purchasing power and preclude them financially from participating in RDOF to bring service to additional locations. Moreover, CAF winners have proven experience in navigating both the auction and the two-part application process, a demonstrated commitment to infrastructure deployment, and a mature understanding of the Commission's high-cost obligations, attributes that should not be disadvantaged by applying more burdensome letter of credit rules that are not relevant to other potential applicants. Removing this competitive disadvantage will promote the public interest by encouraging additional participation in the RDOF program from experienced CAF winners to the benefit of the millions of homes and small businesses in unserved areas, by encouraging more robust competition among potential applicants for the new round of universal service support.

The Commission has taken such corrective actions with the specific objective of promoting broadband deployment through reduction of disparate costs imposed upon service

[30] *See, e.g.,* AtLink Comments at 1 n.1; CenturyLink Comments at 1; GeoLinks Comments at 9; Windstream Comments at 5.

providers.[31] It should take such action here to ensure that service providers already receiving CAF II support are not unduly burdened by letter of credit fees and have the same flexibility available to RDOF support recipients in bringing new broadband service to rural and other high-cost areas. In order to effect these changes fully and equitably, the Commission should adopt an additional provision in Section 54.310 of its rules codifying the optional 20 percent buildout milestone afforded to RDOF support recipients as a means of early reduction of their letter of credit obligations.[32]

To the very limited extent that the Commission addresses the difference between the CAF II letter of credit rules and those adopted for the upcoming RDOF auction, the *RDOF Order* states merely that "given that the [RDOF] will award up to almost 15 times the amount of funding as the CAF Phase II auction, we acknowledge that a one-size-fits-all approach to letter of credit requirements may not properly reflect the realities of a particular auction."[33] But given the essential purpose of the rules to protect federal support funds from being misspent, the relatively smaller size of CAF II support would seem to suggest, if anything, that *less stringent* rules would be appropriate there, rather than more rigorous benchmarks. In any case, it is not the total funds available for universal service support that was cited as the element of decisional significance justifying the rule change, but the adverse impact of overly strict requirements generally on the ability of individual support recipients to meet letter of credit obligations and

[31] *See, e.g., Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7706 & 7767-68, ¶¶ 1 & 123 (2018) (revising the pole attachment rules to ensure that "an incumbent LEC will receive comparable pole attachment rates, terms, and conditions as a similarly-situated telecommunications carrier or a cable television system" with the objective of "promot[ing] broadband deployment by speeding the process and reducing the costs of attaching new facilities to utility poles").

[32] *See* Attachment 2, Proposed New Section 54.310(d).

[33] *RDOF Order* at 46-47, ¶105.

satisfy required buildout milestones. In this instance, the Commission itself has indicated that the specific rules that currently apply to the CAF II program "impose a disproportionate financial burden on support recipients and result in less funding going directly to broadband deployment."[34] Given that finding, there is no basis for continuing to impose such rules on support recipients that are already working to implement new service under that program.

III. AMENDING SECTIONS 54.310 AND 54.315(c) LIKELY WILL RESULT IN FEWER DEFAULTS AND MORE EXPEDITIOUS BUILDOUT

In explaining its need to preserve letter of credit requirements in some, albeit modified, respects, the Commission stated in the *RDOF Order* that "[t]he letter of credit requirement did not deter broad participation in the CAF Phase II auction where we awarded $1.488 billion in support to 103 bidders and, as of December 2019, nearly 90 percent of carriers have been authorized after securing valid letters of credit."[35]

The actual impact of the letter of credit requirements on auction participation is hard to judge. To be sure, a significant number of bidders participated in the CAF II auction. What is not known is how many potential applicants decided not to participate and how many participants decided to bid less actively because of the onerous letter of credit requirements. Logically, if the Commission had applied its new RDOF rule to the CAF Phase II auction, more providers would have participated and bid to provide service to additional eligible areas, thereby increasing competition for support and extending service to even more unserved areas.

More importantly, while the Commission has been quite successful in authorizing funding with a small number of defaults so far, the current CAF II letter of credit requirements will likely result in *more* defaults in the future than would otherwise have been the case. It is

[34] *Id.* at 46.

[35] *Id.* at 44, ¶96.

true that, as of the date of this Petition, only one auction winner has defaulted for withdrawing its application because it claimed to be "unable" to obtain its initial letter of credit.[36] But the value of the letters of credit must increase every year, and recipients that managed to obtain letters of credit for the initial year of support may be hard pressed to obtain letters for three times that amount. The cumulative nature of the CAF II letter of credit amounts combined with milestone requirements beginning in Year Three could thus lead to additional future defaults. This outcome would leave recipients building fully compliant, supported networks unable to complete their funded projects, and instead subject them to funding suspension and enforcement proceedings.

The Commission's decision in the *RDOF Order* to reduce the value of letters of credit and to create the "carrot" of further reductions for accelerated buildout and the "stick" of increased amounts for non-compliance strikes a more appropriate balance for all high-cost recipients, and should now be applied to recipients of CAF Phase II auction-based support.

Conclusion

As described herein, the existing letter of credit rules applicable to CAF II high-cost support recipients are identical to those that the Commission initially proposed, then rejected and modified, in establishing rules for the upcoming RDOF auction. The conforming rule changes proposed by the CAF II Coalition are intended to address the same barriers to successful broadband deployment that the Commission cited in the *RDOF Order* and to assist these service providers as they work to offer new broadband service to unserved locations. The proposed rule changes will help reduce recipients' costs and offer them greater financial flexibility in funding

[36] *Workable Programs & Systems, Inc.*, Notice of Apparent Liability and Forfeiture, 34 FCC Rcd 10029, 10031 (¶7) (2019).

their buildout obligations. No recipient, customer, potential customer or the public interest at large would be impacted in a negative way by this rule change. To the contrary, adopting the modified rules will help to close the digital divide by ensuring more Americans have access to broadband service, significantly improving economic opportunity in rural areas.

Respectfully submitted,

CAF II COALITION

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Its Attorneys

ATTACHMENT 1

Members of the CAF Phase II Coalition

Air Link Rural Broadband, LLC

AMG Technology Investment Group LLC dba Nextlink

Aristotle Unified Communications

AtLink Services, LLC

California Internet, L.P. dba GeoLinks

Cal.net, Inc.

Chariton Valley Communications Corporation

Citynet LLC

Crystal Automation Systems, Inc.

IdeaTek Telcom, LLC

Inventive Wireless of Nebraska, LLC

Midcontinent Communications

Newmax LLC dba Intermax

Paul Bunyan Rural Telephone Cooperative

Plains Internet, LLC

Sunset Digital Communications, LLC

SW DinehNet LLC (an affiliate of Sacred Wind Communications, Inc.)

W.A.T.C.H. TV Company

Wikstrom Telephone Company

Wilkes Telephone Membership Corporation

Wisper ISP, Inc.

ATTACHMENT 2

Proposed Revisions to Part 54 of the Commission's Rules

Section 54.310 is revised by adding a new Subsection 54.310(d), below, and by re-designating existing subsections (d), (e) and (f) as (e), (f) and (g):

(d) *Optional Interim Deployment Milestone.* Recipients of Connect America Phase II awarded through a competitive bidding process may elect to accelerate deployment of service to cover 20 percent of supported locations by the end of the second year as a means of obtaining early relief from the multi-year letter of credit requirements, as provided for in Section 54.315(c)(1)(v).

Section 54.315(c)(1) is revised as follows:

(c) *Letter of credit*. Before being authorized to receive Phase II auction support, a winning bidder shall obtain an irrevocable standby letter of credit which shall be acceptable in all respects to the Commission.

(1) *Value*. Each recipient authorized to receive Phase II support shall maintain the standby letter of credit or multiple standby letters of credit in an amount equal to, at a minimum ~~the amount of Phase II auction~~, one year of support ~~that has been disbursed and that will be disbursed in the coming year~~, until the Universal Service Administrative Company has verified that the recipient ~~met the final service milestone as described in § 54.310(c).~~ has served 100 percent of the Connect America Cost Model-determined location total (or the adjusted Connect America Cost Model location count if there are fewer locations) by the end of year six.

(i) For year one of a recipient's support term, it must obtain a letter of credit valued at an amount equal to one year of support.

(ii) For year two of a recipient's support term, it must obtain a letter of credit valued at an amount equal to eighteen months of support.

(iii) For year three of a recipient's support term, it must obtain a letter of credit valued at an amount equal to two years of support.

(iv) For year four of a recipient's support term, it must obtain a letter of credit valued at an amount equal to three years of support.

(v) ~~(i) Once the~~ A recipient ~~has met its 60 percent service milestone, it~~ may obtain a new letter of credit or renew its existing letter of credit so that it is valued at ~~a minimum at 90 percent of the total support amount already disbursed plus the amount that will be disbursed in the coming year~~ an amount equal to one year of support once it meets its optional or required service milestones under Section 54.310(c) or (d). The recipient may obtain or renew this letter of credit upon verification of its buildout by the Universal Service Administrative Company. The recipient may maintain its letter of credit at this level for the remainder of its deployment term, so long as the Universal Service Administrative Company verifies that the recipient successfully and timely meets its remaining required service milestones.

(vi) (~~ii) Once the~~ A recipient ~~has met~~that fails to meet its ~~80 percent~~required service ~~milestone, it may~~milestones must obtain a new letter of credit or renew its existing letter of credit ~~so that it is valued~~ at ~~a minimum at 60 percent of the total support that has been disbursed plus the~~an amount ~~that will be disbursed in the coming~~equal to its existing letter of credit, plus an additional year of support, up to a maximum of three years of support.

(vii) A recipient that fails to meet two or more required service milestones must maintain a letter of credit in the amount of three year of support and may be subject to additional noncompliance penalties as described in § **54.320(d)** .